United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

"Original"

76-4085

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition for Review of Orders
of the Interstate Commerce Commission

JOINT BRIEF OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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JOINT BRIEF OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION
(Typewritten Copy)

QUESTIONS PRESENTED

1. Whether the orders of the Commission are, to some extent, barred from review in this court by the 60-day statute of limitation of 28 U.S.C. §2344.

2. Whether the Commission's orders approving new rates are supported by substantial evidence and otherwise in accord with law.

STATUTES PRIMARILY INVOLVED

The statutes primarily involved in this case, 49 U.S.C. §§3(1) and 3(4), are quoted at pp. 2-3 of petitioner's brief.

STATEMENT OF THE CASE

By this action the petitioner State of New York seeks to review and set aside decisions of the Interstate Commerce Commission which found that certain rates published by the Soo Line Railroad Company and the Erie Lackawanna Railway Company are just and reasonable and otherwise lawful. The Commission's decisions were entered in its proceeding entitled Investigation & Suspension Docket No. 8899, Unit Train Rates on Wheat, Minn. & Wisc. to Martins Creek, Pa.

The rates involved are proportional rates[1/] which were first published to become effective on November 1, 1973, from two origins -- Minneapolis - St. Paul, Minnesota (Twin Cities) and Duluth, Minn. - Superior, Wisc. (Twin Ports) -- to the destination point of Martins Creek, Pa.[2/] Two levels of rates were proposed from both origins, a higher level to apply during the season of closed navigation on the Great Lakes (hereafter, the "closed-season rates"), and a lower level to apply during the season of open navigation (hereafter, the "open-season rates"). The rates apply on wheat, in bulk, in covered hopper cars with a capacity of 4500 feet or more, with certain other qualifications.

1/ Proportional rates are continuation rates which are utilized in connection with "gathering rates" from origin points in the grain trade. Gathering rates from country origins to Twin Cities and Twin Ports are, for the most part, equalized.

2/ Martins Creek is located on the Delaware River approximately 7 miles north of Easton, Pa., and Phillipsburg, N.J.

The proposal was supported by ConAgra, Inc., a producer of grain-derived foods which has a flour mill at Martins Creek, and protested by numerous shippers, carriers, and port and community interests. The interest of the protestants primarily involved Buffalo, N.Y., itself a large grain milling center where several protestants -- Peavey Company, Standard Milling Company and Pillsbury Company, for example -- operate mills. The new rates were also opposed by competing transportation companies -- the Penn Central Transportation Company, and the Lake Carriers Association, an association of water carriers operating on the Great Lakes. Opposition was also noted by Buffalo-area political entities, such as the City of Buffalo, Erie County, N.Y., the Niagara Frontier Transportation Authority, and others. The State of New York was not involved in the proceeding at this phase.

In general, wheat from the Twin Ports can move over an all-rail route or a combination rail-water route (via Buffalo) to Martins Creek. Wheat from the Twin Cities to Martins Creek can move over an all-rail route. Soo Line operates from both origins to Chicago, while Erie operates from Chicago to Martins Creek. Erie also operates between Buffalo and Martins Creek, and between Chicago and Buffalo.

After the new rates were filed, a number of protests and petitions for suspension and investigation of the rates under 49 U.S.C. §15(7) [3/] were submitted. The Commission's employee Suspension and Fourth-Section Board first declined to suspend or investigate. However, upon reconsideration, Division 2 of the Commission issued an order suspending the rates for seven months and instituting an investigation. Further petitions for reconsideration of this decision were denied.

The case was then set down for evidentiary proceedings, including the filing of verified statements (i.e., affidavits) by the parties and subsequent oral hearing for the purpose of cross-examination and the development of supplemental evidence. Numerous statements were filed, and several days of hearings were then held in January and February, 1975.

By its report and order issued in June 1974 (Joint appendix 440a-513a, 346 I.C.C. 814), Division 2 of the Commission approved the rate proposal in part and disapproved it in part. Essentially, the closed-season rates from both the Twin Cities and the Twin Ports were found to be just and reasonable and otherwise lawful, as were the open-season rates form the Twin Ports.

3/ Section 15(7) no longer applies to railroads subject to the Act. Pursuant to Pub. L. 94-210, 91 Stat. 31, the "Railroad Revitalization and Regulatory Reform Act of 1976" new section 15(8) of the Interstate Commerce Act governs suspension and investigation of railroad rates. However, section 15(7) applied at all times material to this case.

However, the open-season rates from the Twin Cities were found to be in violation of section 3(1) of the Act (49 U.S.C. §3(1)) and were ordered cancelled.

The Commission made numerous separate findings in the June 1974 report. It found that the proposed rates were compensatory, thus disagreeing with contentions of the Penn Central, the Buffalo flour mills, and others, that the rates would not be compensatory as to Erie. The Erie share of the rate was fully analyzed as to its revenue-producing potential[4/] and the Commission found that the proposal would have a favorable revenue effect (346 I.C.C. at 837). The Commission also found, contrary to assertions of Penn Central, the Buffalo mills, and others, that the proposal was operationally feasible (346 I.C.C. at 838-40).

The Commission also found that the proposed rates were largely free of violations of section 3(1) of the Act, which prohibits undue or unreasonable preferences and advantages, but not entirely. As to the open-season rates from the Twin Cities the Commission stated (346 I.C.C. at 854-55):

4/ This aspect of the case was analyzed because of Erie's tenuous financial position. Erie is in reorganization pursuant to Section 77 of the Bankruptcy Act (11 U.S.C. §205).

Protestants Seaway Port Authority of Duluth and International Association of Great Lakes Ports and the protestant flour mills allege that application of the 72.25-cent rate from Twin Cities and Minnesota Transfer as well as from Twin Ports is preferential to the former and prejudicial to the latter, is unjust and unreasonable and constitutes a destructive competitive practice. Protestants submit that the /2.25-cent rate is designed to meet the alternative transportation cost available to ConAgra of moving wheat from Twin Ports to Buffalo, the elevator cost at Buffalo, and the rail rate beyond to Martins Creek, but they point out that there can be no similar justification for applying the same rate from Twin Cities and Minnesota Transfer about 160 miles inland from Twin Ports. The true alternative cost from Twin Cities would include a factor of 15 cents which is the charge for moving wheat from Twin Cities to Twin Ports. Respondents in reply show that grain rates from most country origins are the same to both Twin Cities and Twin Ports and that the same rates apply from both terminals to both the gulf and Atlantic ports for export, as well as to points in official territory.

We agree with protestants. Both Twin Cities and Twin Ports are large grain terminal centers and we may properly assume that they are in competition for the outbound movement of wheat. Twin Ports by reason of its location has a transportation advantage in relation to Twin Cities which the proposed 72.25-cent rate ignores. Respondent Soo serves both Twin Cities and Twin Ports and does not show why a water-related rate from Twin Ports should be applied to origins 160 miles inland. We are not persuaded that past practices equating the rates to and from the two markets nor the future possibility of fourth section violations in the event other carriers join the adjustment constitute sufficient reason for similarity of treatment in this proceeding. A lawful rate from the preferred origins would be 88 cents which is substantially the product of the local 15-cent rate from Twin Cities to Twin Ports and the proposed 72.25-cent rate beyond.

The Commission then concluded (at 855):

> Upon consideration of all evidence of record, we conclude that the proposed 72.25-cent rate from Minneapolis, St. Paul, and Minnesota Transfer, Minn., to Martins Creek, Pa., is unlawful to the extent that the rate from those points is less than 88 cents. We further conclude that the proposed 72.25-cent rate from Duluth-Superior (Twin Ports) during the season of open navigation on the Great Lakes and the proposed 88-cent rate from all tariff origins during the season of closed navigation are shown to be just and reasonable and otherwise lawful.

Following issuance of the June 1974 report, several petitions for reconsideration were filed; first, by the proposing railroads and ConAgra, seeking reconsideration of the disapproval of the Twin Cities open-season rate, and second, by other parties seeking reconsideration of the approval of the remainder of the proposal. No petitions were filed by the parties which actively opposed the new rates previously; i.e., the Penn Central and the Buffalo-area milling interests. The petitioner here, State of New York, was permitted to intervene for the first time to represent the interests of various political entities which had been represented separately previously, and to file a petition for reconsideration (J.A. 514a). Replies to these various petitions were also filed.

By order issued in July 1975, the Commission's Division 2 issued an order (J.A. 613a-614a) which denied the petitions for reconsideration of the State of New York and

two other opponents of the rates, but which granted the petitions of the Soo Line and Erie and ConAgra (and one other) of the disapproval of the Twin Cities open-season rate.[5/]

By a report and order issued in February 1976 (J.A. 615a-620a, 351 I.C.C. 470), the Commission's Division 2 found upon reconsideration that the proposed Twin Cities open-season rates were just and reasonable and not otherwise unlawful. As the Commission found, the lower Twin Cities open-season rate was essentially justified by market competition: where a carrier has reduced rates from one point to meet water competition, the market competition thus created justifies reduced rates from other origin points to the same destination. Numerous prior decisions were cited in support of this proposition (351 I.C.C. at 474-75). The Commission also observed that it had in the prior report rejected the argument that Martins Creek had an advantage over Buffalo in that it had an all-rail competitive rate from Twin Ports while Buffalo did not, noting that the new rates were structured to equalize as nearly as possible the transportation costs as between Buffalo and Martins Creek, and, further, that factors other than transportation costs were influencing mobility in the selection of flour distributors (351 I.C.C. at 477). By its

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5/ The Commission also permitted the intervention in support of the railroad respondents of the Commonwealth of Pennsylvania, and the filing of a reply by Pennsylvania to New York's petition for reconsideration.

second report the Commission merely extended the logic of its earlier decision to the Twin Cities open-season rates (Id., at 477-78). As the Commission also observed, there was no showing on the record of any competitive injury to Buffalo interests resulting from the proposed rates (Id., at 478); and that the inability of Buffalo mills to obtain transportation from the Twin Cities during the open season on the same basis as Martins Creek was not such a circumstance as would cause an undue or unreasonable disadvantage in violation of section 3(1) (Id.). The Commission also rejected other arguments of unlawfulness (Id., at 478-79).

Following increase of the second report, the instant court action was commenced.

ARGUMENT

I.

THE ORDERS OF THE COMMISSION OF JULY 18, 1974, AND AUGUST 5, 1975, ARE BARRED REVIEW AND THE ONLY MATTER PROPERLY BEFORE THE COURT ON REVIEW IS THE COMMISSION'S APPROVAL OF THE TWIN CITIES OPEN-SEASON RATE IN ITS ORDER OF FEBRUARY 11, 1976.

It is our understanding that the intervenors' motion to partially dismiss the petition for review, which was filed originally on May 28, 1976, and heard and denied without prejudice to its renewal by the Court on June 15, 1976, will be renewed. Respondents hereby support that motion, for the reasons previously stated by intervenors.

We will not at this time duplicate the legal arguments of Soo Line and ConAgra, with which we are in agreement, but will merely make one observation concerning the practical consequences of not granting this motion. It will be recalled that the Commission's order of July 1975 (J.A. 613a-614a) denied petitions for reconsideration of New York and others which sought review of the July 1974 order's finding that the closed-season rates from Twin Ports and Twin Cities, and the open-season rates from Twin Ports only, were just and reasonable and not otherwise unlawful. At the same time, the July 1975 order granted the petitions for reconsideration of Soo Line, Erie, ConAgra, and others, of the July 1974 order's disapproval

of the open-season rate from Twin Cities. There can be no question but that the Commission thus evidenced an intention to consider no further the question of the validity of the rates which had been found lawful in the prior order. Accordingly, the July 1975 order was a final order, and any judicial review of the Commission's decision finding the rates lawful would have had to be commenced within 60 days of the service of that order. 28 U.S.C. §2344.

If the July 1975 order is not regarded as a final order, a serious problem is created. According to that view, an agency could simply grant a petition for reconsideration of one part of an order, deny petitions for reconsideration of all other aspects of the same order, and thereby forestall judicial review indefinitely while the petition which was granted is under consideration. In the present case that process took approximately six months to complete; in other cases it could take a longer period of time. We do not see any reason why such a result is compelled by either the applicable law or logic, and accordingly, we support the motion to partially dismiss the petition for review. 6/

6/ Petitioner has asserted that the granting of this motion would result in "piecemeal" review litigation, since court proceedings would commence prior to termination of the administrative proceedings. Strictly speaking, this argument is inappropriate since the matter is jurisdictional; however, there is an answer to it. Should a court action be commenced under these circumstances, the Court could, in its discretion, decide to stay proceedings pending completion of the ancillary administrative proceedings. Whether the Court would want to do so would depend on the circumstances of each case.

II.

THE COMMISSION'S ORDERS ARE SUPPORTED BY THE EVIDENCE AND ARE OTHERWISE IN ACCORD WITH LAW

It is beyond dispute that an order of the Interstate Commerce Commission is subject to a limited scope of judicial review. Decisions supporting this proposition are legion, but the outlines of a reviewing court's jurisdiction, in a case involving questions not dissimilar to the present case, were recently well stated by a three-judge district court in this Circuit as follows:

> Commission "action, findings, and conclusions" will be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" if they fail to meet statutory, procedural, or constitutional requirements; or if they are not supported by "substantial evidence." 5 U.S.C. §706(2)(A)-(E). See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-414, 91 S.Ct. 814, 28 L. Ed.2d 136 (1971). Nevertheless, our scope of review is narrow. Under the "arbitrary and capricious" standard, Commission action must be sustained if there is a rational connection between the facts found and the conclusions reached. Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). Insofar as Dreyfus bases its challenge to the Commission's findings on 5 U.S.C. §706(2)(E) our scope of review is confined to determining whether those findings are supported by "substantial evidence." "Substantial evidence" has been defined as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 . . . [A]nd the possibility of drawing two inconsistent conclusions from the evidence does not prevent

> an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-620, 86 S.Ct. 1018, 1026, 16 L.Ed 131 (1966). In essence, we are limited in this proceeding "to ascertaining whether there is warrant in the law and the facts for what the Commission has done." United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 536, 66 S.Ct. 687, 698, 90 L.Ed. 821 (1946); Salem Transportation Co. v. United States, 285 F.Supp. 322, 324 (S.D.N.Y. 1968).

Louis Dreyfus Corp. v. United States, 401 F.Supp. 919, 924 (S.D.N.Y. 1975). See also, TNT Tariff Agents, Inc., v. I.C.C., 525 F.2d 1089, 1093, 1095 (2d Cir. 1975).

A. Arguments Relating to Section 3(4) of the Act Are Not Properly Before This Court, and are Without Merit in any Event.

The first major allegation of error in the briefs of the petitioner and the intervenor in support of petitioner

is that the Commission in its orders here involved did not find the rates in question to be in violation of section 3(4) of the Act. The short answer to this contention is that it is not properly before this Court at all, since no party before the Commission raised this issue in their petitions for reconsideration of the July 1974 order. New York did not raise the issue, and S&E Shipping did not either because it was not a party in the Commission proceedings.

The Supreme Court has made it clear what the rule is in these circumstances. In United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 37 (1952), it stated:

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.
>
> * * * * *
>
> Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

See also United States v. Capital Transit Co., 338 U.S. 286, 291 (1949). Numerous lower court decisions following Tucker state the same principle, including some which make clear that

"the time appropriate under its practice" to raise an argument is in a petition for reconsideration. See, e.g., Slay Transportation Co., Inc. v. United States, 353 F.Supp. 555, 558 (E.D. Mo. 1973) (three-judge court). Accordingly, this Court should not, in our view, be required to consider argument relating to section 3(4).

In any event, those arguments are without merit. Section 3(4) provides in pertinent part:

> All carriers subject to this part . . . shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

The Commission treated this issue in its July 1974 report stating as follows (346 I.C.C. at 852):

> Section 3(4) provides in effect that rail carriers shall not discriminate in their rates between any connecting line or unduly prejudice any connecting line in the distribution of traffic that is not routed by the shipper. Insofar as is pertinent to the issues in this proceeding, a connecting line is defined as a common carrier by water subject to part III of the act. So far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4). Aside from this, however, it is clear that there is no merit in protestant's argument. Section 3(4) is designed to discourage unequal treatment of connecting carriers at a given point. The proposed all-rail route passes well south of Buffalo and Erie does not extend unequal treatment at Buffalo as between carriers.

This language brings to light three obvious points. First, the traffic in question is specifically routed by a shipper, ConAgra. The rates were initiated for ConAgra's needs and ConAgra is the user. Beyond this, the record before the Commission did not--and the Commission so stated in the above language--reveal that any "connecting carriers" were protected by section 3(4). The only connecting carriers are Great Lakes water carriers which are not subject to Part III of the Interstate Commerce Act. This point is vigorously confirmed by S&E Shipping in its brief to this Court.[7/]

The Commission also discounted the effect of section 3(4) by noting that that section is intended to discourage unequal treatment of connecting carriers at a given point, and that the all-rail route in issue goes well sought of Buffalo and does not extend unequal treatment at Buffalo as between carriers (346 I.C.C. at 852). This was a proper

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7/ By contrast, New York claims that some such water carriers are subject to Part III (Brief, pp. 12-15). However, in making this claim, New York relies solely on matters raised in petitions for suspension of the rates after they were first filed, and such petitions do not, under the Commission's rules (49 C.F.R. 1100.19), constitute part of the record in the subsequently initiated formal investigation and suspension proceeding. Apart from this procedural point, it is clear that New York is reaching very far to make a point. No lake water carrier ever asserted in the proceeding that it was subject to Part III, and neither did the Lake Carriers' Association, which did not even identify its members interested in the proceeding. It is clear that this whole line of argument is merely an afterthought to be presented to this Court, a point underscored by the total failure of any party to raise the §3(4) argument on petition for reconsideration.

conclusion. The all-rail route here involved does not reach Buffalo, the point at which New York says a connection within the meaning of section 3(4) takes place. The fact that Erie serves Buffalo on other routes does not change this conclusion. Ingot Molds, Ohio & Pa. to Cypress, Tex., 349 I.C.C. 102 (1975), is decidedly not in point because there it was shown that the railroads were not permitting a competitive rail-water rate where the point of interchange for water carriers (Houston) was on the all-rail route at issue. There is no authority for extending the terms of section 3(4) to the present far different situation, and contentions relating to this section should be rejected.

B. The Commission Properly Found that the Rates in Issue do Not Violate §3(1) of the Act.

The second contention of New York is that the Commission's approval of the Twin Cities - Twin Ports to Martins Creek rates is in violation of section 3(1) of the Act. This contention is wholly without merit.

As the Commission noted in the first of the two reports in the proceeding below (346 I.C.C. at 854), the standards for establishing a violation of section 3(1) are well established. As was stated in Chicago Board of Trade v. Illinois Central RR. Co., 344 I.C.C. 818, 840 (1973), sustained

sub nom Chicago & E.I.R.R. Co. v. United States, 384 F.Supp. 298 (N.D. Ill. 1974) (three-judge court), aff'd. mem., 421 U.S. 956 (1975):

> To support a finding of a violation of section 3(1) it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. Compare Big River Industries, Inc. v. Aberdeen & R.R. Co., 329 I.C.C. 539. The complainant has the burden of proving the presence of the first three factors, and the defendants have the burden of justifying the disparity under "(4)."

Moreover, it is clear that even in an investigation of proposed rates under 49 U.S.C. §15(7), in which the overall burden of proof is upon the proposing carriers, it is up to parties alleging injury to back up these claims with reliable, probative evidence. This was specifically held by a three-judge district court in this Circuit, which rejected the argument of a party allegedly aggrieved by reduced rates to other points that the Commission had unreasonably relied on the absence of evidence submitted by that party bearing on the issue of injury. Louis Dreyfus Corp. v. United States, 401 F.Supp. 919, 926-27 (S.D.N.Y. 1975). As the Court there stated, the railroads had the ultimate burden of proof, but the Commission could indeed take into account the absence of

evidence submitted by a protesting party on the question of injury. Underlying the entire argument relating to §3(1) is the fact that no probative evidence of injury was presented by any party in this proceeding, and that the parties which initially tried to make such a showing, i.e., the Buffalo mills, have long since withdrawn from further participation.

However, apart from the question of injury there is another problem with petitioner's argument before this Court, and that has to do with the question of what is the alleged §3(1) violation involved. Before the Commission New York claimed for the first time that the open-season rates violated section 3(1) because of the allegedly harmful effect on Buffalo shippers (J.A. 582a-587a). Yet the Buffalo shippers themselves did not file any petition for reconsideration and New York's petition was filed on behalf of various political entities in the Buffalo area, and not on behalf of the shippers.

The Commission rejected arguments that the approval of the rates in question was in violation of §3(1), and correctly so. As it stated in the second report (351 I.C.C. at 477):

In the prior report division 2 dealt with these arguments as applied to the navigation season rate from the Twin Ports. It found that the proposed open and closed season rates from Twin Ports are structured as nearly as practical to equalize the alternative transportation costs as between Buffalo and Martins Creek and that bakers in eastern territory exercise a considerable degree of mobility in the purchase of flour, many floating from one producer to another, which suggests that factors other than transportation costs also influence mobility in the selection of flour distributors. At page 848 of the prior report division 2 stated:

> The marketing of flour is a competitive business with sales turning on as little as a cent or less difference per 100 pounds. The positioning of flour mills close to the markets they will serve is a policy of ConAgra, as well as the mills with which it competes. It is not the purpose of the act to equalize every producer's position in a given market. See Wheat & Wheat Flour, Westbound, 337 I.C.C. at 879-880. 8/

8/ It is also noteworthy, as was pointed out by Soo Line and Erie in their reply to petitions for reconsideration (J.A. 593a-596a) that these railroads have maintained an all-rail unit-train route between Twin Ports and Twin Cities and Buffalo. While the Buffalo mills generally do not use this alternative during the open season because the water route is cheaper, the fact remains that the all-rail rate to Buffalo is available, has been used during the open season, and is less expensive per mile than the all-rail rate to Martins Creek.

Now before this Court New York presents an entirely different §3(1)-based argument, which is that the Commission's approval of the Soo Line-Erie rates to Martins Creek is discriminatory and prejudicial to water carriers operating in and out of Buffalo. This argument was not made by New York in its petition for reconsideration before the Commission, and should be disregarded for that reason alone. United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 37 (1952) (see pp. 14-15, supra). However, the point is without merit in any event. New York cites Lake Carriers' Assn. v. United States, 399 F.Supp. 386 (N.D. Ohio 1975), where certain railroads had published unit-train rates which were lower than rail-water rates under which the traffic had moved previously, and refused to publish lower comparable rail-water rates. The railroad maintained that the all-rail route was the lower-cost route, and that for this reason the refusal to publish a lower rail-water rate was justified. The Court held that the failure to publish a rail-water rate under these circumstances was in violation of §3(1), and observed, "If the all-rail routes are truly the lower cost system, then the railroads have nothing to fear from the publication of a tariff or unit-train service prescribing proper rates to the ports" (399 F.Supp. at 393).

In the present case, neither New York nor any other party introduced any evidence bearing on the cost of the all-rail route versus the cost of the water-rail route, which,

in contrast to the Lake Carriers situation, afforded the Commission no chance to deal with the issue. This simply underscores the fact that the argument was not even raised, and is a good illustration of why the rule of Tucker Truck Lines is necessary. Beyond this, it does not even appear that anyone even asked Erie to publish a unit-train rate between Buffalo and Martins Creek -- a rate which New York now says is required -- which once again demonstrates the essential difference between this case and Lake Carriers and once again underlines the importance of the Tucker rule.

CONCLUSION

For all the above reasons, the petition for review should be dismissed and all relief should be denied.

Respectfully submitted,

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